2-21-2003

Re Saint John (City of) and Saint John Fire Fighters' Association, IAFF Local 771 (Davidson)

Innis Christie

G Lawson

A Levine

Re City of Saint John and Saint John Fire Fighters' Association, I.A.F.F. Local 771

[Indexed as: Saint John (City) and Saint John Fire Fighters' Assn., Loc. 771 (Davidson) (Re)]

File No. 2003-006

New Brunswick
I. Christie, A. Levine and G. Lawson

Heard: January 23 and 24, 2003
Decision rendered: February 21, 2003

PRELIMINARY AWARD concerning arbitrability of grievance.

R. Davidson and others, for the union.
J.L. Nugent and others, for the employer.

PRELIMINARY AWARD

Union grievance on behalf of the Grievor alleging that he was hired and subsequently fired without due process, contrary to the 2001-2003 Collective Agreement between the parties, and seeking full redress. At the outset of the hearing in this matter the parties agreed that this Board of Arbitration is properly constituted and, subject to the City's preliminary objection, properly seized of this matter. The City made a preliminary objection to the jurisdiction of this Board of Arbitration to hear this matter based on the allegation that the Grievor was never an employee of the City; *i.e.*, that he was never hired. The parties agreed that the Board would hear evidence and argument on the preliminary objection and rule on it before dealing with the allegation that the Grievor was improperly discharged.

It was agreed that if the Board rejects the City's preliminary objection we will proceed with the merits as soon as possible. If the preliminary objection is sustained the Grievance must be dismissed.

AWARD ON THE PRELIMINARY OBJECTION

This award on the City's preliminary objection is an unusual labour arbitration award in that it turns largely on the law governing the creation of the employment relationship rather than on the interpretation of the Collective Agreement. On that basis we have decided that this Board of Arbitration has jurisdiction in this matter because the Grievor was an employee when he received the City's letter of July 19, in effect, terminating his employment, and when the Grievance was filed.

The Grievor, Michael Davidson, was a candidate for appointment as a "Holiday Relief Firefighter". Under the Collective Agreement between the parties Holiday Relief Firefighters are called in to work when one of the fire stations in the City of Saint John is short-handed because of vacations or statutory holidays. The Holiday Relief Firefighters are in the Union's bargaining unit and are covered by the Collective Agreement between the Union and the City. They get weekly pay cheques, not just when they are called in. The position of Holiday Relief Firefighter is attractive to many people because, although they are paid at only about half the rate of a regular firefighter and are subject to lay-off, whenever the complement of regular Firefighters falls below that budgeted for, the City fills any vacancies from the ranks of the Holiday Relief Firefighters, based primarily on seniority. Articles 10 and 25 of the Collective Agreement are relevant to this, but do not concern us directly here.

In early 2002 the City advertised for Holiday Relief Firefighters. Two hundred and fifty to three hundred people applied. The Grievor passed through several initial screenings and a rigorous month of training at Millidgeville, for which he paid all expenses, and was informed that he had been successful in his application to become a Holiday Relief Firefighter. On May 12, apparently the evening of the day upon which he received that good news, the Grievor got into a bar fight, or fights, in Saint John. After investigation, the City informed him that, according to the City's view of the matter, he would not become a Holiday Relief Firefighter. The central issue in this preliminary award is whether, at that point, the Grievor was already covered by the

Collective Agreement and entitled to the protection it affords against unjust discharge.

Article 2, the "Recognition" clause, provides that the City recognizes the Union as exclusive bargaining agent for "all employees" in the certified bargaining unit, as amended. It is undisputed that Holiday Relief Firefighters are "employees" and that the Collective Agreement applies to them. Indeed, Article 20 addresses their status and rights in some detail.

The Collective Agreement provides for unjust discharge in Articles 7:01 and 20:01, as follows:

> *7:01* The Union acknowledges that it is the exclusive right of the City to: hire, lay-off, discharge, discharge, classify, assign, reclassify, transfer, promote, demote or discipline employees subject to the provisions of this Agreement.
>
> .....
>
> *20:01* The Grievance is defined as an alleged violation of the Collective Agreement or a case where either party has acted unjustly or improperly in the administration of the Collective Agreement or the Rules and Regulations of the Department.

Article 20 then goes on to set out the grievance procedure. Article 21:04 provides that in Step 1 of the procedure all grievances are to be initiated by "the employee or employees". Apart from the question of whether the Grievor was an employee at the time the Union says he was discharged, there is no dispute that the Grievance procedure was followed, so there is no need to set out the details here.

By way of *preliminary objection* Mr. Nugent, for the City, took two related positions; first that the Grievor was not at any material time an employee under the Collective Agreement and that the Union therefore has no standing to grieve on his behalf, and, second, that the Grievance is on an issue not addressed by the Collective Agreement, except to the extent that the Collective Agreement makes it clear that hiring is exclusively within the jurisdiction of the City.

The sole question for us in this Preliminary Award, then, is whether the Grievor was an employee at the time the Union claims he was discharged.

Responses in the Grievance Resolution Process. The Fire Chief's response at Step 1 of the grievance procedure, dated August 1, 2002, is:

> Mr. Davidson was an applicant for the casual position of Holiday Relief Firefighter, at no time was he hired nor could it be considered that he was an employee of the City of Saint John.

The Chief then quotes Article 2 of the Collective Agreement, set out above, and Article 5, which requires the check-off of Union dues from the pay of "all employees", and Article 21, which is also set out above.

The City Manager's response at Step 2 of the grievance procedure, dated August 14, 2002, is:

> . . . I have reviewed the appropriate background and have concluded that Michael Davidson was never in fact hired by the City of Saint John.
>
> I do understand that he was on an eligibility list of potential candidates, but a situation occurred that resulted in his removal from the list.
>
> The City's position is that Local 771 is the bargaining agent for employees of the Department. Since I, as City Manager, never approved the hiring of Michael as an employee, it would be inappropriate to entertain a grievance submitted by Local 771 on behalf of an individual who is neither an employee or a member of the Bargaining Unit.

Step 3 of the grievance procedure required submission of the Grievance to the Common Council, that is the Saint John city council. The Union did so under date of August 26, 2002. The Common Council's response, dated September 30, 2002, was:

> At a meeting of the Common Council, held in Legal Session on the 23rd instant, the following resolution was adopted, namely:—
>
> > "RESOLVED that Council does not have jurisdiction with respect to the matter raised by Local 771 in its letter of August 26, 2002, addressed to the Mayor and Common Councillors."

The following note of the proceedings in Common Council on September 23, produced by the Union, is in evidence by agreement:

> Grievance hearing September 23, 2002 pertaining to the dismissal of Michael Davidson
>
> In attendance were Chuck Hickey, Larry Cook and members of Common Council
>
> Council would only discuss whether or not the grievance fell under the jurisdiction of Local 771. The city manager said Michael Davidson was not an employee as he did not sign any letter stating that he was hired by the city. President Hickey referred to a letter Dated June 6, 2002 indicating that Michael Davidson was hired by the City of Saint John, which was signed by John McIntyre, manager of Human Resources, and a copy of which was sent to Fire Chief Glen Tait. The city manager responded by stating the [*sic*] John McIntyre does not have authority to hire personnel. President Hickey then referred to a letter dated July 19, 2002 in which John McIntyre informed Michael Davidson that he was not eligible for employment with the city. President Hickey questioned how Mr. McIntyre had the authority to effectively dismiss someone but not have the authority to hire that same person. A copy of

> the letter was sent to the city manager, as well as the fire chief and deputy chief. We were then asked to leave the hearing and were told that council would discuss the matter and inform us of their decision in writing.

Facts. We heard the testimony of Fire Chief Glen Tait, Deputy Fire Chief Robert Simonds, Human Resources Manager John McIntyre, City Manager Terrance L. Totten and the Grievor, Michael Davidson. There is no need to set out all of their testimony or all of the documentary evidence. The facts relevant to this preliminary objection, in addition to those set out above, are as follows.

The Fire Chief is the head of one of the City's departments, the others being headed by Commissioners. His undisputed testimony was that he reports directly to the City Manager and is accountable to him. Any decisions relating to the Fire Department but outside the scope of his authority are dealt with on the basis of his recommendations to the City Manager. This, Chief Tait testified, includes hiring and firing. Surprisingly perhaps, he does not have authority to do either. When a suitable candidate for either permanent appointment or appointment as a Holiday Relief Firefighter has been selected through the Human Resources process, the Chief recommends the hiring of that person to the City Manager, who then normally gives his approval. There is no basis for disputing this testimony.

A selection committee consisting of the Fire Chief, the Deputy Fire Chief and the Human Resources Manager decided who, among the applicants for the position of Holiday Relief Firefighter who met the formal qualifications, would go on the four-week training course established by the City. It is undisputed that the process of applying and training for the position cost the Grievor $478 for tests, plus the cost of transportation to the training facility and his forgone wages as a fully qualified carpenter working for the four weeks of the training school.

At the end of the training course the Fire Chief met with and congratulated those who had successfully completed the course. He told them that at least ten of them would be hired right away, depending on their standing.

Under date of June 6, 2002, the Grievor received the following letter on the letterhead of the "Corporate Services Department, City of Saint John", signed by "John McIntyre, Manager Human Resources", and indicating that it had been copied to "Fire Chief Glen Tait":

Dear Mr. Davidson:

RE: HOLIDAY RELIEF FIREFIGHTER ELIGIBILITY LIST

Congratulations, as a result of your participation in the selection process and the training school of the Saint John Fire Department your name is placed 9th on the eligibility list for *casual* employment as a Holiday Relief Firefighter. This decision on your placement is final and this notice is a courtesy intended to address concerns regarding future employment opportunities. Specific scores will not be provided.

It is our intention to have this list expire January 1, 2004.

Please note, that this letter is not an offer or guarantee of future employment with the City of Saint John. The City of Saint John reserves the right to abolish the list and re-advertise at anytime. Applicants on the eligibility list will be required to provide an updated security clearance and participate in a fitness evaluation at a time and location determined by the City of Saint John.

Of the persons who went through the training, eighteen received letters like this one, advising them of where they placed on the "2002 Holiday Relief Firefighters Placement List", which is in evidence. That list indicates that the scores and standing were based 40 per cent on "Training", 30 per cent on "Suitability Assessment", 20 per cent on "Fitness" and 10 per cent on "Aptitude". This sort of letter has been standard practice in the hiring of Holiday Relief Firefighters in the past.

Also under date of June 6, 2002, the Grievor received another, more important letter on the letterhead of the "Corporate Services Department, City of Saint John", signed by "John McIntyre, Manager Human Resources", also copied to "Fire Chief Glen Tait". Because the Chief had decided that sixteen new Holiday Relief Firefighters were required, the top sixteen of the people listed on the "2002 Holiday Relief Firefighters Placement List" referred to in the letter quoted above received these second letters, the text of which was similar to the following:

Dear Mr. Davidson;

I'm pleased to offer you the casual position of Holiday Relief Firefighter under the following conditions:

- The salary is $11.28 per hour;
- This is a casual position and you will be subject to lay-off;
- The terms and conditions of employment are in accordance with the Local 771 Collective Agreement, and;

Employees are encouraged to maintain residence in Saint John; however this is not a condition of employment.

> If the above conditions are satisfactory, employment with the City of Saint John will commence on June 17th, 2002.
>
> Please sign below to acknowledge your agreement with these conditions, ensuring there are no discrepancies or omissions.

To the right of Mr. McIntyre's signature is a line for the Grievor's signature, as indicated by the word "Sign" under it, and further to the right is the word "Date". The original of this letter is in evidence. It bears the Grievor's signature, which is dated "June 11/02". No doubt was cast on that as the date on which it was in fact signed. It is also date stamped as "Received Jun 20 2002 Human Resources", indicating 9:40 a.m.

The evidence is that this round of hiring Holiday Relief Firefighters was the first in which a letter anything like this one was used in the process. Previously the selected candidates were simply called in for a meeting with the Fire Chief or the Deputy Fire Chief and told that there was a place for them and when they were to start. Mr. McIntyre did not explain why the use of this letter was initiated on this occasion.

In his testimony under cross-examination Chief Tait agreed that there was nothing more for the people who received this letter to do to accept employment with the City than to "accept the offer".

On the face of this second letter of June 6th to the Grievor, which we refer to as the "letter of offer", under the indication that a copy of it has gone to Fire Chief Glen Tait, are the words, in slightly smaller font than the body of the letter:

> NB: Please make an appointment with the Human Resources Assistant to complete the mandatory Basic Group Life Insurance application.

This Insurance is available for "all employees" under Article 14 of the Collective Agreement.

On June 12 the Grievor called the Human Resources Assistant, Ms. Mary Melanson. He told her that he had received the letter of offer, that it all seemed in order to him and that he had signed it. This evidence was not challenged. The Grievor asked her for the appointment referred to at the foot of the letter. She made an appointment for him at 9:00 a.m. on June 14.

Then, on June 13 the Grievor told the supervisor for his employer, the District 8 School Board, where he had worked for five years, that he would no longer be working at his job as a carpenter with a school board. His supervisor was already familiar with his hopes and plans,

because he had been unable to work regularly during the month of the firefighters' training school. He had been scheduled to work the week of the 13th, but was off sick that day and scheduled to attend a safety meeting the next day, which was a Friday. He did not officially terminate. The Grievor testified that in that employment it had not been uncommon for him to not come to work upon a day's notice to his employer, and "fill out the paper after that". He had been making about $33,000 a year, but preferred to work as a Holiday Relief Firefighter for about $23,000 because of the opportunity it afforded to become a permanent firefighter.

When he learned on June 14th that he would not, in fact, be reporting for work as a Holiday Relief Firefighter on June 17th, the Grievor went back to his supervisor at the School Board and was put back to work there. He has been employed there since.

There was nothing said or written to the Grievor between June 12 and June 14, or indeed at any time before he received the letter of July 19, to give him any reason to think that his hiring was subject to the approval of the City Manager or anyone else. However, the City introduced considerable evidence on the matter of the approval of his hiring

For each of the sixteen people who received the second June 6 letter, the letter of offer, a "CITY OF SAINT JOHN Personnel Action Form" (referred to by the parties as a "PA") was prepared in the City's Human Resources Department. In electronic format these "PA"s appear as screens, accessible only to a person with the password. All sixteen "PA"s are in evidence, except the Grievor's, the electronic form of which was deleted and cannot be retrieved. None of the City's witnesses could explain why this happened, and each denied he had given any direction that this be done. Moreover, Mr. Nugent gave his undertaking that he would pursue the possibility of retrieving it and advise this Board. He has been advised by the providers of the system used by the City that it is impossible to recover this deleted form, and that it must have been deleted before a backup was created. While this is contrary to the Chair's general understanding that, with sufficient effort and expertise, any electronic file can be recovered unless the hard drive has been physically destroyed, we accept the evidence that the "PA" created for the Grievor cannot be recovered.

All fifteen "PA"s in evidence bear the date upon which they were "prepared" and a "Hire date". It is clear that the City's pattern was

to start the hire dates on "6/09/02" for the person who stood first on the "2002 Holiday Relief Firefighters Placement List" and date them on successive days to "6/24/02" for the person who stood sixteenth. The evidence is undisputed that this was done to create clear seniority ranking under the Collective Agreement.

There is no doubt whatever that a "PA" was prepared in the Human Resources Department for the Grievor with a "hire date" of "06/17/02", which is the only date missing from the sequence of documents in evidence. The "Prepared" date, which is the date the document was printed, on the first ten "PA"s before us is "6/12/02". The first three of the last five are dated "6/20/02" and the last two "6/24/02". The Grievor's would, of course, have been the ninth. The first ten forms in evidence are numbered consecutively from "PAF number: 813" to "PAF number: 823" inclusive except that "PAF number: 821", which would have been the ninth, and which, obviously, was the Grievor's, is missing. That is, there were eleven forms with numbers from 813 to 823 inclusive. The other five, with the "Prepared" dates of "6/20/02" and "6/24/02" are numbered "842", "843", "844", "851" and "852" respectively.

Chief Tait testified that he "would have" approved "PA"s by bringing up the form electronically and clicking in the highlighted area on the screen, which sends the form on to the City Manager for approval. The form has at the bottom under the heading "*Approvals*":

> STAFFING APPROV.
>
> COMMISSIONER'S
>
> CITY MANAGER'S
>
> PRINTING APPROV.

These approvals are sequenced electronically, so, without specific intervention by the Human Resources staff, no "PA" is presented for approval, nor can it even be seen, until it has received approval at the level which appears above it in this list.

All but the last five "PA"s in evidence (that is numbers "842", "843", "844", "851" and "852") have opposite the word "COMMISSIONER'S" the printed words and numbers "Tait, Glen 6/11/02". Because of the way the system works, Chief Tait was certain that he would have given his approval to these first "PA"s on the 11th of June, except the Grievor's, which, he testified, he did not

approve. The "PA"s numbered "842", "843" and "844" have opposite the word "COMMISSIONER'S" the printed words and numbers "Tait, Glen 6/19/02", and "851" and "852" have "Tait, Glen 6/24/02".

Terrance Totten, City Manager of the City for the past ten years, testified that only he has authority to approve the hirings, including Holiday Relief Firefighters. He referred to the legislation establishing the City, which, as we point out below, does not appear to justify this view, but did not give any other basis for saying that only he had this authority. We do not doubt that in practice Mr. Totten approves all hirings. Mr. Totten then explained the electronic process by which hiring approvals are sequenced. He said that virtually every morning he approves from four to twenty-five "PA"s. He testified that he never saw a "PA" for the Grievor.

All but the last five "PA"s in evidence have opposite the word "CITY MANAGER'S" the printed words and numbers "Totten, Terry 6/11/02". That is, they indicate that they were approved by the City Manager on the same day the Fire Chief approved them. The "PA"s numbered "842", "843" and "844" indicate that they were approved by the City Manager on June 20, the day after the Fire Chief approved them, and "851" and "852"indicate that they were approved on June 24, the same day the Fire Chief approved them. All were also approved by John McIntyre, the Human Resources Manager. Mr. McIntyre testified that without his approval the pay process is not activated. He was on vacation when all but the last five "PA"s in evidence were approved, so his handwritten signature appears on them, undated but placed there on his return. From the evidence it would seem that someone in the Human Resources Department must have enabled the bypassing of Mr. McIntyre's approval for the first eleven "PA"s. Otherwise, they could not have reached the Fire Chief. Mr. McIntyre approved the "PA"s numbered "842", "843" and "844" electronically on June 18 and the last two on June 24.

Deputy Chief Simonds testified that the "PA"s had been sitting on the Chief's system for a few days, until the Deputy asked him to access them and move the approval process along. Sometime before June 9, according to the Deputy's testimony, the Deputy had prepared a list of "HRFF APPOINTMENTS 2002", which is in evidence. It shows the "1st assignment" for each of the successful trainees, the "DATE" and their employee numbers, in sequence. They appear in

sequence according to their standing in the selection process and training course. There is a gap after the name of the trainee who stood eighth and before the name of the trainee who stood tenth. It is clear that when Deputy Chief Simonds prepared this document, which he sent to the Human Resources Department to be used in preparing the "PA"s, the Grievor was listed with an assignment dated June 17th, and the employee number "4392", which is missing from the sequence on this list.

Chief Tait testified that prior to June 11 he had heard rumours of an altercation involving candidates for appointment as Holiday Relief Firefighter, but with no names. He testified that on June 11 he was given specifics, involving the Grievor, by Deputy Chief Simonds. This testimony was corroborated by the Deputy Chief. Chief Tait told the Deputy Chief Simonds to contact Mr. McIntyre, the Manager of Human Resources, and have him investigate. According to Deputy Chief Simonds, Chief Tait's instructions were that he was going to hold the Grievor "in abeyance" until after the investigation. We accept this testimony, but note that neither the Grievor nor the Union was ever told that approval, necessary in the City's view to hiring, was being "held in abeyance".

When the Grievor came in for his June 14 appointment Deputy Chief Simonds and Mr. McIntyre met with him. Mary Melanson had called the evening before to tell him to come early because they wanted to talk to him. The meeting started when, after talking together briefly, they asked that the Grievor be shown in. The first thing the Grievor did, before there was any discussion of his start date being delayed, was to slide the letter of offer, with his signature on it, across the table to Mr. McIntyre. It is undisputed that Mr. McIntyre looked at it, saw that it was signed and put it to one side for the duration of the discussion.

Mr. McIntyre testified that he had the impression the Grievor thought he was there to discuss the date he was to start work, which the Grievor testified, was in fact what he had thought. Mr. McIntyre testified:

> I stopped him. I said "this may happen, it may not. There are some issues."

The Deputy Chief reiterated this. Mr. McIntyre testified that the Grievor seemed "a bit surprised". According to the Deputy Chiefs testimony the Grievor asked "do I go to work on the 17th" and, according to his own testimony, the Deputy Chief told the Grievor,

that it "was not clear he was going to work on the 17th, or something like that".

Mr. McIntyre told the Grievor that allegations had been made about his behaviour on May 24. The Grievor then gave his version of those events. Deputy Chief Simonds testified that he told the Grievor that "he was not cut out of the process", that "he was not guaranteed to be hired as a Holiday Relief Firefighter" but that it "could come to fruition pending the outcome of the investigation". He and Mr. McIntyre assured the Grievor the investigation would be thorough, and the Grievor took no issue with that. By the end of the meeting the Grievor understood he was not going to work on the 17th, but Mr. McIntyre testified that the signed letter of June 6th was "not revoked". The Grievor testified that he understood, simply, that his starting to work was delayed pending the investigation.

At the end of the meeting Mr. McIntyre passed the signed letter of June 6th back to the Grievor. His testimony was: "I did not accept or keep it". He testified that the Grievor commented "If I become an Holiday Relief Firefighter I won't have to worry about this", but under cross-examination Mr. McIntyre was clear. He said that he did not say anything to withdraw the letter, and replied "no" when asked if he "revoked the letter on the 14th".

After the meeting the Grievor went to Mary Melanson to fill out the insurance forms. Mr. McIntyre intercepted him, saying simply, "not today".

The "Hire date" on each of the "PA"s, including the Grievor's, corresponded to the date in the June 6 letter of offer where it states, using the letter to the Grievor as an example:

> If the above conditions are satisfactory, employment with the City of Saint John will commence on June 17th, 2002.

According to the Fire Chief's evidence, that was the date when pay commenced for each of the new Holiday Relief Firefighters hired in June of 2002, and each reported to his work group on the first date after that when his group was scheduled to be on duty. According to Deputy Chief Simonds, that was also the date when the Union check-off started, in accordance with Article 5:01 of the Collective Agreement.

On June 17th, according to Deputy Chief Simonds' testimony the investigation of the Grievor's involvement in a bar fight was still not complete.

Mr. McIntyre and the Deputy Chief met with the Grievor again on June 20, at the Grievor's request. The tone of this meeting was very different. The Grievor presented a prepared letter, asking that everything be taken into consideration. Deputy Chief Simonds told him that they were conducting a thorough investigation and would get back to him when it was completed. At the end of that meeting the Grievor had the signed letter of June 6th date stamped.

The Grievor heard nothing more until on July 23 he received the following letter dated July 19, 2002, on the letterhead of the "Corporate Services Department, City of Saint John", signed by "John McIntyre, Manager Human Resources", copied to "Terrance L. Totten, C.A. City Manager", "Fire Chief Glendon Tait" and Deputy Fire Chief Rob Simonds:

> Mr. Davidson:
>
> *Re: Holiday Relief Firefighter Positions*
>
> A complaint was received surrounding your alleged unfavourable conduct at Darcy Farrows Bar and Cougar's Bar. After a thorough investigation surrounding the two incidents and two separate meetings with you, the disposition of the matter was not hastily made. The selection board has concluded that you are no longer considered suitable for this emergency services provider.
>
> This is to advise that your name is being removed from the eligibility list and that you will no longer be considered suitable for an employment opportunity with the City of Saint John Fire Department.

The Issues. As we said at the outset, the central issue in this preliminary award is whether, when he was told that he would not be a Holiday Relief Firefighter, the Grievor was already covered by the Collective Agreement and entitled to the protection it affords against unjust discharge. For the City, Mr. Nugent took the position that the Grievor was never an employee of the City and for that reason had no status to grieve, the Union had no status to represent him and this Board of Arbitration has no jurisdiction to hear his Grievance.

(1) Mr. Nugent referred us to dictionary definitions of "employee", submitting that the Grievor was not an "employee" until he began to render service for compensation.

(2) Mr. Nugent submitted that customarily and, more importantly, by virtue of the *Saint John City Government Act*, S.N.B. 1912, c. 42, as amended by S.N.B. 1960-61, c. 130, no one could become an employee of the City of Saint John without the approval of the City Manager, which, on the evidence, was never given here.

(3) In Mr. Nugent's submission the lack of a Personnel Action Form, a "PA", indicating the grant of that approval made it clear that the Grievor had never become an employee of the City.

(4) The second letter of June 6, Mr. Nugent submitted, could not be considered an offer of employment because Mr. McIntyre had no authority to make such an offer. He could not commit the City. The doctrine of apparent authority, he submitted, did not assist the Grievor because he did not alter his position to his detriment by leaving his employment because he never did in fact formally, or actually, terminate his employment.

(5) Mr. Nugent further submitted that, quite apart from those impediments, even if the second letter of June 6 were an offer of employment it only provided for employment commencing on June 17, 2002, subject to the normal administrative processes, which were not completed here.

(6) Moreover, Mr. Nugent submitted, if the second letter of June 6 was an offer it was not accepted in any real sense at the meeting of June 14, because the context was one of putting the offer in abeyance, and the Grievor realized that it was not "a done deal". The arrangement, he submitted, must take colour from the context.

(7) In Mr. Nugent's submission the evidence demonstrated that the Grievor understood that whether or not he would become an employee of the City depended on the outcome of the investigation.

(8) Alternatively, Mr. Nugent submitted that if there was a contract formed by acceptance by the Grievor of an offer in the second letter of June 6, 2002 it did not give the Grievor the status of employee as contemplated by the Collective Agreement, under which, by consistent practice, seniority runs from the stated "date of hire". In this context he relied on *Governors of the University of Alberta v. Assn. of the Academic Staff of the University of Alberta*, [2002] A.J. No. 515 (QL) (C.A.) [reported 39 Admin. L.R. (3d) 316 *sub nom. University of Alberta v. A.A.S.U.A.*]. Even if there were a basis for a contract action, that did not, he submitted, give this Board of Arbitration jurisdiction arising out of the Collective Agreement.

Decision. The Grievor became an employee of the City for purposes of the Collective Agreement, at the latest, on June 17, 2002, which was the date City's offer stated his employment would commence. In our opinion, he in fact became an employee on June 14,

when he communicated his acceptance of the City's offer of employment to Mr. McIntyre, if not on June 12 when he signed the letter of offer. We therefore have jurisdiction to deal with the Grievance submitted by the Union on his behalf on August 1, 2002.

In the words of Chief Justice Bora Laskin in the Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718 at p. 725:

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements.

Therefore, once the Grievor was hired, his relationship with the City was governed entirely by the Collective Agreement, and, as the Supreme Court of Canada more recently held in *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583, at para. 52, any dispute that "in its essential character, arises from the interpretation, application, administration or violation of the collective agreement" is within the exclusive jurisdiction of this Board of Arbitration.

We will now more fully elaborate our conclusion and in the course of doing so address the City's submissions enumerated above.

(1) Dictionary definitions. It is not the law that to be an "employee" a person must have actually begun rendering service for compensation. A person who is party to a contract under which he or she is "in the service" of another is also an employee. Both parties referred us to England and Wood, *Employment Law in Canada* (3rd ed., looseleaf), of which the Chair was the founding author. There are several passages in that text which not only make it clear beyond dispute that Canadian law frequently treats those not actually rendering services, but engaged to do so, as employees, but which are otherwise relevant to the issues here. See *Young v. Okanagan College Board* (1984), 5 C.C.E.L. 60 (B.C.S.C.); *Horvath v. Joytec Ltd.* (1989), 27 C.C.E.L. 269 (Sask. Q.B.); *Levi v. Chartersoft Canada Inc.* (1994), 8 C.C.E.L. (2d) 10 (Man. Q.B.), cited at paras. 7.23 and 7.24.

The *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, from which the Collective Agreement before us here draws its legal force and effect, defines "employee" by stating:

> 1(1) In this Act
>
> .....

> "employee" means a person employed to do skilled or unskilled manual, clerical, technical or professional work . . .

This turns us back to the definition of "employed", which is not set out in the *Act*, but the very dictionary relied on by Mr. Nugent, *The Concise Oxford Dictionary of Current English* (9th ed.), gives as the primary definition of the verb "employ" the following:

> Use the services of (a person) in return for payment; keep a person in one's service.

The second part of this sentence accords with the normal legal usage which often contemplates a person as being "employed", although he or she is not actually rendering services. The accepted notion that a worker on lay-off has a specially limited status as an employee under a collective agreement is a ready illustration of this. The other dictionary relied on by Mr. Nugent, *West's Legal Thesaurus/Dictionary* (1985), similarly defines the verb "employ" as "to engage in one's service".

There are several passages in *Employment Law in Canada* which not only make it clear beyond dispute that Canadian law frequently treats those not actually rendering services, but engaged to do so, as employees, but which are also otherwise relevant to the issues here. In paras. 7.8 and 7.9, applying basic contract principles, the authors state:

> ¶7.8 . . . for the purpose of determining when the employment contract came into existence, the legal questions are: "Was there an offer made"?, and if so, "Was it accepted?" and "When?".
>
> ¶7.9 For there to be an offer, the employer must have demonstrated by its words or conduct that it intends unequivocally to enter into a legal relationship with the employee under an objective standard of intention, that a reasonable person in the position of the parties would conclude that such is the employer's intention. For the offer to be accepted, the employee must perform the act of acceptance as stipulated by the employer or, expressly or impliedly in the eyes of the reasonable person, make the commitment or promise requested by the employer.

At that point, for legal purposes, the offeree is an employee, unless, as the authors go on to discuss, the agreement is made subject to a condition precedent "such as formal approval by the firm's board of directors". In which case, they say, "*depending on the nature of the condition precedent* there may be no contract until and unless the condition precedent is satisfied" (emphasis added). The two types of condition precedent are described in para. 7.12 as being

"those that qualify the performance duty, and those that qualify the very existence of the contract". The authors state that:

> Under the former kind there is a valid contract in force when immediate offer and acceptance coincide but neither party is required to perform their main duties of working or paying wages until the condition precedent is satisfied [citing *Dawson v. Helicopter Exploration Co.*, [1955] 5 S.C.R. 868, espec. *per* Rand J. and, in the employment context, *Leacock v. Whalen, Beliveau and Associates Inc.* (1997), 22 C.C.E.L. (2d) 244 at 268 (B.C.S.C.)].

The first point here is that, as we stated above, Canadian law frequently treats those not actually rendering services, but engaged to do so, as employees. It is well recognized that the definition of "employee" may vary depending on the context in which the term is used. One who is not an employee at common law, for purposes of the law of vicarious liability for instance, may be an employee under a statute, such as the *Industrial Relations Act* which has quite different purposes. In *Re Calvano Lumber & Trim Co. and C.J.A., Local 27*, [1989] O.L.R.B. Rep. April 337 (MacDowell), the OLRB held that a casual labourer was an "employee" for purposes of a certification application, because he had exchanged his labour "for consideration in some form" [para. 15], while noting that under the Ontario *Employment Standards Act*, R.S.O. 1980, c. 228, one could be an employee "without any wages or remuneration in the ordinary sense at all" [para. 12]. People on lay-off or suspension, for example, are commonly considered employees who can claim rights other than payment of wages under collective agreements.

In *Hill v. Develcon Electronics Ltd.*, [1991] S.J. No. 657 (QL) (Q.B.) [reported 37 C.C.E.L. 19], the court found that the letter of offer relied upon in an action for wrongful dismissal had never been accepted so there was no contract of employment, but recognized that the plaintiff has already commenced work, and ordered him compensated on a *quantum meruit* basis. The editors of *Employment Law in Canada* comment on this case in a passage more important for its discussion of *Schwartz v. Canada* (1996), 17 C.C.E.L. (2d) 141 (S.C.C.), which was the subject of the eighth submission by the City, considered below:

> ¶7.14 The *Hill* decision shows that it is possible for work to have commenced before an employment contract is formed. Conversely, there would appear to be some uncertainty in holding that an employment contract can be formed prior to work actually commencing as a result of the 1996 decision of the Supreme Court of Canada in *Schwartz v. R.* There a practising lawyer, Schwartz, concluded an agreement with an investment company to commence

> work for it on a specified future date. Before work began, however, the new employer notified Schwartz that their agreement was rescinded. The parties negotiated a substantial settlement . . . The issue arose whether this settlement was taxable income under the "retiring allowance" provision of the *Income Tax Act* which requires tax to be paid "in respect of loss of office or employment." The Supreme Court of Canada held that the settlement did not derive from "employment" since Schwartz had never actually commenced working for the investment company. This decision could be construed as authority for the proposition that an employment contract cannot exist unless actual work has commenced. It is submitted, however, that such an interpretation would be incorrect. Rather it is submitted that the *ratio decedendi* of *Schwartz* is that the concept of "employment" in the unique context of the "retiring allowance" provision of the *Income Tax Act* requires that actual work must have begun.
>
> ¶7.15 Certainly, there are sound policy reasons for recognizing that a valid employment contract can be formed before work commences. Foremost is the avoidance of detrimental reliance . . .
>
> ¶7.16 Second, if an employer agrees to pay a worker "wages in advance" . . . such monies surely derive from an employment contract for purposes of the employer's obligations to report and make deductions . . .
>
> ¶7.17 Third, in reality many labour market transactions necessarily involve sometimes lengthy delays between the creation of the employment contract and the commencement of work. For example, minor league hockey players . . . school teachers, university professors, research scientists and many others.

Second, the City's submission is, in effect, that on the facts here there were two conditions precedent: that the approval of the City Manager be given and that employment would not start until June 17. As we explain below, we do not accept that the City Manager's approval was, in fact, a condition precedent of the offer made to the Grievor; and the statement that employment would not start until June 17 was in our opinion a condition precedent "of the former kind" described in the passage quoted from para. 7.12 of *Employment Law in Canada* above; but even if it was a condition precedent that qualified the very existence of the contract, *there clearly was an employment contract as of June 17.* We return to this crucial point in our consideration of the City's eighth submission, below.

(2) *By virtue of the Saint John City Government Act, S.N.B. 1912, c. 42, as amended by S.N.B. 1960-61, c. 130, no one could become an employee of the City of Saint John without the approval of the City Manager.* We accept that, on the evidence before us, the City Manager never gave his approval to the hiring of the Grievor because he never "clicked" his approval of the Grievor's Personnel

Administration form, his "PA". Our conclusion, however, is that his not having done so did not make the appointment of the Grievor "*ultra vires*" (outside the powers of) the City because the City Manager's approval was not required by legislation. In Rogers, *The Law of Canadian Municipal Corporations*, looseleaf, at para. 197.1 the author states:

> One principal is clear and runs throughout all the cases involving municipal governments: a person entering into contractual relations with local authorities cannot assume that all the proceedings respecting the authorizing of the contract have been properly taken and that the capacity to enter the contract exists. Parties dealing with a municipal corporation are bound at their peril to take notice of the limits within which and the manner in which the council has power to contract and bind the corporation. It follows from this that persons entering into contractual relations with local authorities cannot rely on the indoor management rule which, in the matter of domestic preliminaries gives some protection to those dealing with trading corporations at least where there has been a breach by the corporation of an imperative statutory provision in the nature of a condition precedent to its right to contract . . .
>
> Apart from such statutory restrictions and prohibitions, the general rule is that municipal corporations, like private corporations, have a general power to contract in furtherance of their corporate objects but where the corporation is of statutory origin its contractual powers are limited and circumscribed by its constituent Act.

There was no suggestion whatever here that the City lacked the statutory capacity to hire a Holiday Relief Firefighter. The only possible relevance of this passage is with respect to the "proceedings respecting the authorizing of the contract", and there is equally no suggestion that the Common Council failed to follow any proceeding required by statute. This is the sort of failing to which the cases cited in Rogers advert. The only issue here is as to the effect of the City Manager's not having approved the hiring of the Grievor.

Neither Mr. Nugent in his argument nor Mr. Totten, the City Manager, in his testimony referred us to any specific provision in the *Saint John City Government Act* to the effect that all appointments or hiring must have the approval of the City Manager, and we can find none. The office of City Manager is provided for in s. 3 of the amending Act, which adds a new s-s. (6) to s. 14 of the *Saint John City Government Act*. That subsection reads as follows:

> 14(6) The Common Council may appoint a person having suitable qualifications as supervising director of all departments of the municipal government of the said City, to be known as the "City Manager" or as he may be otherwise called by the Council. Such person shall devote his whole time to the business

> of the city and be paid a salary to be determined by the Common Council. He shall exercise control of and supervision over the several directors of the said departments, including, but not to limit the generality of the foregoing, the appointment, promotion and dismissal of employees, and shall in such matters be responsible to the Common Council for the efficient administration of the several departments . . . [except the Common Clerk and the City Solicitor].

Clearly, the City Manager has "control and supervision" over the Fire Department, including over the "appointment" of its "employees". However, a statutory grant of control and supervision is not a statutory requirement that the City Manager must approve every appointment before it can become effective. The City Manager probably has the power to make his approval necessary before any appointment or hiring becomes effective, but to do so he must make that clear. We were not told of any public rule or statement to that effect. As we discuss below, this is relevant to Mr. McIntyre's apparent authority to offer the job of Holiday Relief Firefighter to the Grievor.

Mr. Nugent relied on the fact that "customarily" the City Manager's approval is required before any hiring becomes effective, but we were given no proof that any such custom is well known, or known at all, outside the City bureaucracy. This too, of course, is relevant to Mr. McIntyre's apparent authority to offer the job of Holiday Relief Firefighter to the Grievor.

Insofar as there was, and is, an "indoor" customary requirement that the City Manager give his approval before a hiring became effective, it was expressed in the computer system used by the City, which sent all hiring recommendations, in the form of "PA"s, to the City Manager. A fundamental difficulty with the City's reliance on the "PA"s, and the stress the City places on the approval dates they show, arises from the fact that the "hire dates" for the first two new Holiday Relief Firefighters on the "HRFF APPOINTMENTS 2002" list prepared by Deputy Chief Simonds, Stymiest and Horton, are one and two days respectively before the approval dates indicated on their "PA"s. That is, their "hire dates" preceded their approval by either the Chief Tait or City Manager Totten. That is, like the others of the first eleven, except, according to the evidence, the Grievor, they were approved by both the Chief and the City Manager on "6/11/02" but have a "hire date" of "6/09/02" and "6/10/02" respectively.

This suggests that the "hire date" in the "PA"s is not, and was not understood by the City, or the Union, to be the date when employment

commenced, but was a date inserted in these documents purely for purposes of subsequent seniority administration. There is an issue whether the same is true of the dates on which it is stated in Mr. McIntyre's letters of June 6 "employment with the City of Saint John will commence"; in the Grievor's case on June 17, 2002, in Stymiest's and Horton's cases on June 9 and 10. As we point out below, however, our conclusion does not turn on this issue because, even if the "hire date" is treated as the date employment commenced, the offer to the Grievor was not withdrawn by the June 17th.

Mr. Totten, the City Manager, agreed that it had happened that people started to work for the City before he had got around to approving their "PA"s. However, he insisted, those people were very much the exceptional cases, and they could not draw any pay until there was a "PA" approved by him. Under cross-examination, Mr. Totten acknowledged that a person receiving a letter like the second letter of June 6 received by the Grievor might well think that he or she was being offered a job, with no requirement of approval by the City Manager.

(3) The lack of a Personnel Action Form for the Grievor. We have already, in effect, addressed this issue. Neither the Grievor nor the Union was bound by the not always adhered to internal practice of the City of requiring the approval of the City Manager for a hiring to be completed.

(4) Mr. McIntyre could not commit the City. We accept that while John McIntyre, the Manager of Human Resources, was indisputably an agent of the City for many purposes relating to its employees, he did not, in fact, have authority to make a contract of employment with the Grievor. He did, however, have implied authority. To an outsider, to anyone who had not been informed to the contrary, who would more naturally be assumed to have authority to hire ordinary City employees than the "Manager of Human Resources". We find that the Grievor thought that Mr. McIntyre was authorized to offer him the job of Holiday Relief Firefighter and that it was perfectly reasonable for him to have thought so. By putting Mr. McIntyre in that position and authorizing him to use City letterhead paper in dealing with potential employees, the City clothed him with implied authority, which, according to the law of agency, binds it.

In the course of the hearing the Chair raised the issue of Mr. McIntyre's authority, referring to it as "apparent" rather than "implied"

authority. For the City Mr. Nugent submitted that the doctrine of apparent authority did not assist the Grievor because he did not alter his position to his detriment by leaving his employment with the school board, because he never did in fact formally, or actually, terminate his employment. Detrimental reliance is not, in law, a necessary element of the doctrine of implied authority, with which we are in fact concerned here. However, if it is an aspect of the doctrine of apparent authority, there was some detriment here. We find that the Grievor did in fact alter his position to his detriment in reliance on the offer of employment as a Holiday Relief Firefighter made by Mr. McIntyre on June 6, 2002. He was a licensed carpenter working full-time for the District 8 School Board. He told his boss he was terminating, at least as a regular employee, admittedly "without doing the paperwork". No doubt was cast on his testimony to that effect. It would seem that in so doing he put his employment at risk and, at the very least, confirmed to the School Board that his career aspirations were not with it. Because he was a valued employee he was able to return as a regular full-time employee, but that does not satisfy us that he lost nothing in his relationship with the School Board. On either basis, Mr. McIntyre's offer to the Grievor of the position of Holiday Relief Firefighter bound the City.

The learned author of Fridman's *Law of Agency* (7th ed., 1996) states at p. 68, in a paragraph quoted with approval in *North Shore Seafoods v. Montague Seafood Inc.* (1993), 110 Nfld. & P.E.I.R. 322 (MacDonald C.J.T.D., P.E.I.S.C.) at pp. 325-26:

> It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. This may be because what has been expressly stated when the agency relationship was created does not cover the acts performed . . . by the agent . . . [I]f there is no statement which clarifies exactly what the agent's authority is, then the only way of knowing what authority can properly be attributed to the agent is by inferring a certain implied authority . . . [I]f the principal has not consented to his agent's having this implied authority, *and has taken the necessary steps to make the outside world aware of his lack of consent*, then the agent will not have such authority. Failing such lack of consent together with notice thereof to third parties, the agent's implied authority is part of the authority which the parties have agreed upon shall be exercised by the agent on the principal's behalf. [Emphasis added.]

The learned author continues in the next paragraph:

> This form or authority must be contrasted, therefore, from the *apparent* or *ostensible* authority possessed by some agents, resulting from conduct on the

> part of the principle which gives rise to an estoppel[14] . . . The authority to be described here is an authority implied in fact from the circumstances of the parties, unless there is evidence which makes it impossible that such authority should be implied.

Footnote 14 is relevant here. It states:

> [14] . . . the principal may be bound *either* because the agent has acted within his *implied* authority, *or* because the agent has acted with *apparent* authority. Sometimes this has led judges to use the language of estoppel or holding out, when they need only to have referred to the notion of implied authority . . .

Finally on the law of agency in this context, Rogers, *The Law of Canadian Municipal Corporations*, looseleaf, states at para. 198.1:

> Any person dealing with officers of a municipality, in addition to enquiring whether the powers the corporation is purporting to exercise are *intra vires* the corporation, must also enquire whether the officers purporting to bind it have been duly authorized to do so. In dealing with officers and agent of a municipality a person has no right to presume they are acting within the scope of their authority but must ascertain the nature and extent thereof Anyone assuming to bind the municipality by contract must possess express authority for his right to represent the municipality and a contract made without authority is not binding unless the contract is subsequently ratified by the council.

To the extent that this passage might be thought to suggest that the general law of agency does not apply to Mr. McIntyre's offer of employment as a Holiday Relief Firefighter to the Grievor, we do not accept that to be the law. This statement of the law of municipalities is about the inapplicability of the doctrine of apparent authority, or authority by estoppel, in situations in which the municipal council has not, in fact, given anyone authority to contract on its behalf. It cannot apply where, as here, the Common Council has clearly delegated authority to hire to the City Manager, and the issue is whether he has clothed the Human Resources Manager with either implied or apparent authority. Note the last sentence in the quoted passage. Therein lies the clue. Clearly, in the circumstances before us no one could question the City Manager's capacity to *ratify* any contract of hiring made without his approval. Such a contract would not have to go to the Common Council for ratification.

The only case more recent than 1927 cited in support of the quoted passage, *Rejean Lemieux Inc. v. Levesque* (1983), 52 N.B.R. (2d) 103 (Q.B.), had to do with the approval by council of the mayor purchasing building materials. The vendor could not rely on the apparent authority of the council. There was no question of implied or apparent authority granted by one who clearly had that authority

from council. The recent case of *Sherway Contracting (Windsor) Ltd. v. Kingsville (Town)*, Dec. 23, 2002 ON SC 99-GD-46069 (Ducharme J.) [summarized 119 A.C.W.S. (3d) 351 (Ont. S.C.J.)], brought to our attention by the management nominee to the Board, is similarly distinguishable. It is also clear that the person who sought there to rely on a major construction contract with the defendant municipality knew that the person with whom he was dealing did not have the requisite authority to bind the municipality.

Even if these cases could not be distinguished, we cannot accept that in the day-to-day labour relations of a city the size of Saint John the law requires ordinary employees, like the Grievor, to question the authority of someone in the position of Human Resources Manager who purports to offer a contract of employment. If that is the law it puts ordinary people dealing with the City at peril of losing other employment, of taking on commitments they cannot fulfill, and, at least, of having their legitimate expectations dashed.

(5) The second letter of June 6 only provided for employment commencing on June 17, 2002, subject to the normal administrative processes, which were not completed here. There are two submissions here, neither of which we accept. For clarity we have deferred discussion of the first submission and deal with it in conjunction with our discussion of Mr. Nugent's eighth and last submission below.

Turning to the second of these two submissions; there is absolutely nothing in the what we have termed the "letter of offer" from Mr. McIntyre to indicate that it was subject to "the normal" or any other "administrative processes". The letter is set out above and need not be repeated here, except in so far as it states:

> I'm pleased to offer you the casual position of Holiday Relief Firefighter under the following conditions:

None of those conditions, which are clearly stated, has anything to do with "administrative" processes. The note at the bottom of the letter of offer:

> NB: Please make an appointment with the Human Resources Assistant to complete the mandatory Basic Group Life Insurance application.

carries quite the opposite implication. Because Basic Group Life Insurance is only available to employees it suggests that the hiring is complete as far as the City is concerned.

(6) The letter of offer was not accepted in any real sense at the meeting of June 14. As we noted in setting out the facts above, in his

testimony under cross-examination Chief Tait agreed that there was nothing more for the people who received the letter of offer to do to accept employment with the City than to "accept the offer". While the letter speaks for itself in legal terms, we agree with that opinion. In classic contract analysis, once the Grievor brought the signed letter of offer to Mr. McIntyre's attention, at the commencement of the meeting of June 14 with him and Deputy Chief Simonds, he had accepted it, and had communicated that acceptance. Indeed, there is a good argument that, by indicating that the recipients of the letter of offer should "sign", and by not stating anything about the communication of acceptance, Mr. McIntyre waived the normal requirement of communication of acceptance. On both bases, we have concluded that the contract of employment was made before anyone said anything of consequence at the June 14.

Mr. Nugent submitted that this is an unduly formalistic view of what occurred. The arrangement, he submitted, must take colour from the context, which was one of putting the Grievor's employment in abeyance, and the Grievor realized that it was not "a done deal". We do not accept this submission for three reasons. First, formality matters. The issue here is whether there was a binding contract and that depends on when it was made. The City cannot argue timing while at the same time expecting the Grievor to be denied that argument. Second, the evidence is that the Grievor went into the meeting thinking that he had been hired as a Holiday Relief Firefighter and the Deputy Chief, and probably Mr. McIntyre, realized that. Any mutual understanding that the City did not regard it as "a done deal" was not instantaneous on the Grievor's part. There was a definite period of time, however short, during which, as a reasonable person, he correctly understood that he had accepted, and communicated his acceptance of, the City's offer of employment.

Third, *and this is of the utmost importance,* the undisputed evidence is that the offer to the Grievor of employment as a Holiday Relief Firefighter was not withdrawn at the meeting of June 14. It was perfectly consistent with the letter of offer and his acceptance of it that the Grievor's starting work was to be delayed pending the City's investigation of the fights he had been engaged in. Therefore, we cannot conclude that the Grievor's acceptance of the letter of offer and his communication of it was somehow too late because it was nearly contemporaneous with the withdrawal of the offer, or the

alleged putting of the offer into "abeyance". As far as the Grievor was told, or knew, it was his starting work that was put in abeyance, not the offer of employment. On the evidence, the offer of employment was not put in abeyance, and was not withdrawn until the letter of July 19 advising the Grievor that he would not be hired.

(7) The Grievor understood that whether or not he would become an employee of the City depended on the outcome of the investigation. This is not what the evidence establishes. The evidence is that the Grievor understood that his starting work depended on the outcome of the investigation, but he thought that he was employed. It is, of course, standard industrial relations practice for an employer to suspend an employee pending the investigation of a serious disciplinary charge, at the conclusion of which he or she may be exonerated, made subject to discipline, which may a suspension perhaps including the period of investigation, or discharged. As a union activist in his employment with the School board the Grievor would have been familiar with this sort of practice.

(8) If there was a contract of employment formed it did not give the Grievor the status of employee under the Collective Agreement. There are two reasons why we cannot accept this submission on behalf of the City.

First, there is no dispute that, if there was a contract of employment, it provided that the Grievor's "employment with the City of Saint will commence on June 17th, 2002". As we point out above, the evidence from both the Grievor and the City is that the offer of employment was not withdrawn at the meeting of June 14, nor was there any communication between the City and the Grievor between the 14th and 17th. Thus, even accepting the City's understanding of the effect of the provision that the Grievor's employment would not commence until June 17th, from that date forward he was an employee. Therefore, from that date forward the Collective Agreement applied to the Grievor.

In the words of the text *Employment Law in Canada*, quoted above in our consideration of the City's first submission, even if the stipulation that employment would commence on June 17th was a condition precedent that qualified the very existence of the contract of employment, on June 17 that contract came into being and the Grievor was an employee subject to the Collective Agreement.

This conclusion is perfectly consistent with the City's submission that the Grievor should not be treated as having been employed earlier than June 17 because the consistent practice is that seniority runs from, and pay and benefits start on, the date of "employment" in the letter of offer.

There is a second reason why we cannot accept the City's submission that if there was a contract of employment it did not give the Grievor status as an employee under the Collective Agreement. While the first reason, just given, establishes our jurisdiction, our primary conclusion is that the Grievor was an employee with status under the Collective Agreement from the moment he accepted the offer of employment in June 14, or even on the 12th, when he signed it. In the context of this offer we do not think a reasonable person in the Grievor's position would read the statement in the offer that "employment with the City of Saint will commence on June 17th, 2002" as meaning that he would not be hired until then. We interpret those words as meaning that he would not start to work until that date, and, perhaps, depending on the Union's understanding, that his seniority would not start to run until then. In more technical legal terms, reverting to the language of *Employment Law in Canada*, quoted above, we do not think that the stipulation that employment would commence on June 17th was a condition precedent that qualified the very existence of the contract of employment; rather it was a condition precedent "that qualif[ied] the performance duty".

In this context Mr. Nugent, for the City, relied on *Governors of the University of Alberta v. Assn. of the Academic Staff of the University of Alberta*, [2002] A.J. No. 515 (QL) (C.A.) [reported 39 Admin. L.R. (3d) 316 *sub nom. University of Alberta v. A.A.S.U.A.*], where the Alberta Court of Appeal reinstated an arbitral award which he argued was similar to the result the City seeks here. In that matter, on July 25, 1999 the grievor had accepted an offer by the Dean of her faculty of a tenure track teaching position to commence January 1, 2000, subject to her completing her Ph.D. program. In a letter to the grievor dated July 30 the Dean of her faculty wrote "Your appointment will begin January 1, 2000, pending completion of your doctoral program. Please advise the Dean's Office when you have successfully defended. A contract will be forwarded to you at that time for signature." The Collective Agreement between the Faculty Union and the University provided:

> 6:01 The appointment of a staff member shall be made by the Dean.
>
> 6:02 The appointment of a staff member shall be evidenced by the letter of appointment, an example of which is shown in Appendix A.

The grievor successfully defended her thesis and advised the Dean's Office to that effect. She also gave up an opportunity to teach elsewhere, but "differences arose" and on October 1st the Faculty revoked her appointment. As here, the issue was whether the arbitrator had jurisdiction to consider that revocation. He held he did not (*Re University of Alberta and Assn. of Academic Staff* (2000), 88 L.A.C. (4th) 143 (Sims)).

There are several relevant differences between those facts and the situation before us here. There the "offer" was revoked before January 1, 2000, the date the appointment was to be effective. Here, it was not revoked until after June 17, the stipulated start date of "employment". There, the Collective Agreement specifically provided for, and contained the sample text of, the formal contract, which was never signed. The text of that sample letter stated, in capital letters:

> THIS FORM CONSTITUTES THE ENTIRE CONTRACT OF APPOINTMENT BETWEEN THE APPOINTEE AND THE UNIVERSITY AND NO OTHER WRITTEN OR ORAL CONDITION, QUALIFICATION OR AGREEMENT EXISTS OR IS INCLUDED HEREIN BY REFERENCE HERETO EXCEPT AS HEREINBEFORE SET FORTH.

Arbitrator Sims held, at p. 21 of the Quicklaw Report of his award [[2000] A.G.A.A. No. 32 (QL)], that the signing of this document marked "the transition from a person under a contract (solely with the University) 'to be hired' to a person who actually holds that appointment" [p. 168 L.A.C.]. Here there is nothing in the Collective Agreement about the role of the City Manager or the Manager of Human Resources, or about the contract of hiring. The Grievor here signed what appears to be a formal offer of employment.

Arbitrator Sims concluded that, while the grievor may have had an action on what he called the "recruitment contract", she had never been employed under the Collective Agreement. He relied in part on the decision of the Supreme Court of Canada in *Schwartz v. Canada* (1996), 17 C.C.E.L. (2d) 141, an income tax case in which the Court held that an amount paid in settlement of an action for breach of an employment contract with a delayed start date was not taxable as income. At p. 9 of the Quicklaw Report of his award

[p. 152 L.A.C.], the learned arbitrator quoted the Supreme Court of Canada at para. 58:

> "The key element in the words chosen by Parliament to deal with this situation is the definition of 'employment' which is the 'position of an individual *in the service* of some other person'. The statutory requirement that one must be 'in the service' of another person to be characterized as an 'employee' excludes, in my opinion, any notion of prospective employment when the phrase is given its ordinary meaning. An employee is 'in the service' of his or her employer from the moment he or she becomes under obligation to provide services under the terms of the contract. At the basis of every situation of employment is a contract of employment; however employment does not necessarily begin from the moment the contract is entered into." [Emphasis in original.]

It must be stressed that in the case before us, from June 17 on the Grievor was in a different situation from that of *Schwartz*. *The stipulated start date had passed.* Moreover, as the long quote from *Employment Law in Canada* set out above in our consideration of the City's first submission makes clear, *Schwartz* is a tax case, the Court is interpreting the *Income Tax Act*, R.S.C. 1952, c. 148, and, as is commonly understood, tax legislation will be interpreted strictly against the government. It should be noted, however, that at p. 22 of his award in the University of Alberta matter Arbitrator Sims addresses this last point when he says [p. 169 L.A.C.]:

> Although not alluded to in the able arguments presented by the parties, my attention was drawn to the learned comments on the *Schwartz* case in England, Christie and Christie, *Employment Law in Canada*, Butterworths, Third Edition, at section 7.14. I also considered the authors' general disapproval of the two-contract notion as a general proposition for employment law. However, those comments are mostly in the context of common law contracts of employment. Here we have the rather more complex situation of a statutorily created bargaining agent that acts on behalf of persons who, in addition to being employees, hold a statutory appointment or status.

Without agreeing that the use of the *Schwartz* case was justified in analyzing a collective bargaining relationship, we do point out that the Grievor here did not hold "a statutory appointment or status". He was hired by contract and then immediately became subject only to the Collective Agreement between the Union and the City.

On judicial review before Alberta Court of Queen's Bench, after detailed consideration of both the facts and the standard of review, Watson J. quashed the award in *University of Alberta*, on the ground that it was "incorrect" and "patently unreasonable" ([2001] A.J. No. 406 (QL) [reported 32 Admin. L.R. (3d) 175]). His Lordship held that

Article 6.01 of the collective agreement there, which is set out above, gave the Dean the power of appointment and it was not limited by Article 6.02, which is also set out above. He observed, at para. 111 that the university "possessed the power to instruct the Deans in how to issue conditional letters of proposal that would not mislead the readers". We observe that the City possesses that same power of instruction.

Watson J. was reversed by the Alberta Court of Appeal, which reinstated arbitrator Sims' award. (*Governors of the University of Alberta v. Assn. of the Academic Staff of the University of Alberta*, [2002] A.J. No. 515 (QL) [reported 39 Admin. L.R. (3d) 316]). The Court of Appeal held that the standard of review was "patent unreasonableness", not correctness, and held that the award was not patently unreasonable. This, of course, does not give the imprimatur of correctness to the award. Indeed the Court states at para. 19:

> Applying the correct standard of review, is the decision of the arbitrator patiently unreasonable? We cannot say that it is. While we might not have come to the same conclusion that he did, there is sufficient justification for determining, as the arbitrator did, that the Faculty Agreement did not cover contractual negotiations and agreements between the University and Dr. Onyskiw for the period preceding her formal appointment as a member of the academic staff under an appointment letter.

After setting out Arbitrator Sims' characterization of the formal letter of appointment as "the transition", the Court of Appeal continued at para. 23:

> While we concede that one can make an argument to the contrary, and indeed while we might well have come to a different conclusion, we do not find this to be a patently unreasonable interpretation of the collective agreement.

Hardly a ringing endorsement!

Without wanting to be unduly repetitious, we must stress again that there was no provision here for separate "formal appointment", either in the letter of offer or the Collective Agreement. As is quite normal, Article 7:01 simply states that the Union acknowledges that it is "the exclusive right of the City to: hire . . .". Nowhere does the Collective Agreement further address the hiring of Holiday Relief Firefighters.

Finally, in an arbitration award brought to our attention by the Union nominee to the Board, *Re Waterfront Foremen Employers' Assn. and I.L.W.U., Loc. 514* (1996), 46 C.L.A.S. 66, arbitrator Longpre held that new foreman were "hired" when their employment

was agreed to, not when they actually started work. He was interpreting a collective agreement provision which required a job opening to be reposted if no one was hired to fill it within 105 days. The Union there was arguing that five foremen had not been hired within that period. The Employer claimed they had been, and relied on *Employment Law in Canada*. At para. 37 the arbitrator states:

> I accept the rationale in *Employment Law in Canada, supra*, concerning a hiring. The employer must make an offer of employment. The individual must accept that offer. The offer and acceptance must be clear and if so, they constitute a hire. *Employment Law in Canada* adopted a practical approach. Individuals could incur substantial costs in their reliance on being hired, prior to starting work.

As with *Governors of the University of Alberta v. Assn. of the Academic Staff of the University of Alberta*, the facts and issues in *Re Waterfront Foremen Employers' Assn. and I.L.W.U., Loc. 514* were quite different from those before us here. That award does, however, serve to emphasize that what constitutes "employment" or "hiring" for legal purposes must depend on the context and purposes for which the meaning is being sought. On the facts before us the Grievor was employed when he accepted the offer of employment sent to him by Mr. McIntyre, acting for the City.

Conclusion and Order. We have decided that this Board of Arbitration has jurisdiction in this matter because the Grievor was an employee when he received the City's letter of July 19, in effect, terminating his employment, and when the Grievance was filed.

We have concluded that nothing in the *Saint John City Government Act*, S.N.B. 1912, c. 42, as amended by S.N.B. 1960-61, c. 130, requires the approval of the City Manager before a person can become an employee of the City. There is nothing in the Collective Agreement which requires such approval and there was no evidence that the Union or the Grievor had that understanding. The lack of a Personnel Action Form, a "PA", indicating the grant of that approval is therefore irrelevant.

We have further concluded that the second letter of June 6 to the Grievor from Mr. John McIntyre, Manager of Human Resources for the City, was an offer of employment because Mr. McIntyre had implied or apparent authority to make such an offer, and, while unnecessary to our conclusion on this point, in our opinion the Grievor did alter his position to his detriment in reliance on Mr. McIntyre's implied and apparent authority. That letter did not make

the Grievor's employment subject to any "normal administrative processes". That offer was accepted by the Grievor when he signed it, or if not, certainly when he passed it to Mr. McIntyre, who read it, on June 14. Nothing in the meeting of June 14 put the Grievor's employment "in abeyance". The Deputy Chief and Mr. McIntyre addressed only his starting date.

We have concluded that, even if the Grievor could be said not to have commenced his employment until the date set out in the letter of offer, as of that date, June 17, he was an employee for purposes of the Collective Agreement and our jurisdiction under it. However, we are satisfied that in law the Grievor was "employed" as of June 14 when he accepted the City's offer, although his commencement of work and his "employment" for seniority purposes was delayed until the 17th.

The hearing in this matter will, therefore, reconvene on the agreed dates.